APPENDIX A

Decision of the Court of Appeals for the Second Circuit

Felix Ramirez,

Petitioner-Appellee,

v.

E. W. Jones, Superintendent,

Respondent-Appellant.

No. 966, Docket 81-2431.

United States Court of Appeals,
Second Circuit.

Argued April 6, 1982.

Decided June 30, 1982.

Before Kearse and Pierce, Circuit Judges, and Leval, District Judge.*

Pierce, Circuit Judge:

On November 11, 1976, appellee Ramirez was involved in an altercation with one Estaban ("Smokey") Casilla during which appellee stabbed Casilla, who later died from the wound. Appellee was indicted for murder in the second degree and tried before Justice Ivan Warner and a jury in New York State Supreme Court, Bronx County. At trial appellee admitted stabbing Casilla, but contended that

* Hon. Pierre N. Leval, United States District Judge for the Southern District of New York, sitting by designation.

he had acted in self-defense. On May 4, 1978, appellee was convicted of manslaughter in the first degree. He was subsequently sentenced to imprisonment for an indeterminate term of five to fifteen years.

On July 17, 1980, appellee's conviction was affirmed by the Appellate Division, First Department, in a lengthy opinion from which two justices dissented. *People v. Ramirez*, 76 A.D.2d 115, 430 N.Y.S.2d 83 (1st Dep't 1980). Appellee's application for leave to appeal to the New York Court of Appeals was denied on August 21, 1980. Appellee then filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of New York, 530 F.Supp. 345. Appellee contended therein that by charging the jury, *inter alia*, that "[a] person is presumed to intend the natural and probable consequences of his acts," the state court improperly shifted the burden of proof on the issue of intent to the defendant in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). On November 16, 1981, the district judge granted appellee's petition and ordered that he be released unless retried within sixty days. The State appealed, and on December 22, 1981, Judge Motley granted a stay of her order pending this Court's decision of the appeal. We now affirm.

The circumstances under which Casilla was stabbed on November 11, 1976, were hotly contested at appellee's trial. According to the People's evidence, the incident which resulted in Casilla's death began outside a social club when he and appellee became embroiled in a heated argument over a woman. Casilla then suggested to appellee that the two of them should "fight like a man, one on one."

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(Tr. 112). Prosecution witnesses testified that, in preparation for the fight, Casilla took off his jacket and turned to give it to one of his friends to hold. They stated that while Casilla was thus turned away, appellee pulled out a knife and stabbed Casilla in the chest. A melee ensued during which appellee was hit on the shoulder with a cane and/or a crowbar or police lock bar, and appellee moved toward Casilla's associates, who remained nearby, brandishing his knife. Finally, two police officers arrived at the scene and arrested appellee.

Appellee testified in his own defense and presented a different view of the events which occurred before and after the stabbing of Casilla. He testified that approximately two weeks prior to the incident on November 11, 1976, Casilla and two other men accosted appellee on the street, beat him, and robbed him of his money, wristwatch, a medal and a ring which he wore on a chain around his neck.[1] He testified further that on November 11, 1976, while walking outside the social club, he was surrounded by five men. Casilla was carrying a police lock bar; the others had sticks and canes.[2] When the men had surrounded him, Casilla stated that they were going to "do to me the same thing they had done the first time." (Tr. 302). According to appellee, Casilla then swung at him with the police lock bar. Appellee ducked and then pulled out a knife and

1. Appellee testified that at the time of this robbery (October 30, 1976), he did not know any of the three men who attacked him. However, when he saw Casilla on November 11, he recognized him as one of the three men.

2. Both of Casilla's associates who testified at appellee's trial admitted that they, Casilla, and the others present when Casilla was stabbed, were members of a gang called the Savage Nomads.

stabbed Casilla.[3] Appellee testified that his intent at that time was to defend himself. He testfiied, "I got scared. I got nervous because they all surrounded me and that's when—I squeezed the knife that I had but not with the intention of killing him but of defending myself." (Tr. 322). After the stabbing, appellee brandished the knife at the four men who still surrounded him and who he thought were going to jump him and beat him with their sticks. The police then arrived and arrested appellee.

In addition to the above, Assistant District Attorney Knauer, who interviewed the appellee at the police station after his arrest, and testified for the prosecution at the trial, stated that appellee admitted to him, at the station house, that after the hold-up on October 23, he (Ramirez) told Casilla that he would "get even" with him. In his summation to the jury, appellee's counsel argued, in light of Assistant District Attorney Knauer's testimony, that, even if, on October 30, when Casilla allegedly beat and robbed appellee, appellee did in fact threaten to "get even" with Casilla, "all that meant was he would do the same thing that happened to him, that was done to him by Smokey and the two other men. What was that [?] [B]eing robbed and being assaulted. Certainly there is nothing there to indicate any intent to kill . . . ." (Tr. 471). It is clear, therefore, that appellee sought to convince the jury that when he stabbed Casilla he lacked any intent to kill him.[4]

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3. Appellee testified that he had a kitchen knife with him because he had just finished using it to clean the battery in this brother's car.

4. Appellee's trial counsel did request that the court charge manslaughter in the second degree and assault as lesser included offenses. The court declined to do so.

Appendix A

The Sandstrom Violations

The trial judge charged the jury extensively with reference to the question of intent. He stated as follows:

"Let me now define this word intent for you.

A person is presumed to intend the natural and probable consequences of his acts. Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof to constitute the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed, rests upon the Prosecution to establish by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof to an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only

determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, you then are to determine the intention of the perpetrator at the time.

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts. The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind, and it's [sic] physical manifestation[,] [*t*]*he accomplishment of the thing determined upon*[.] [*O*]*ne's mind is compelled from necessity to refer to the acts and physical manifestations of the intent exhibited by the results produced is the safest, if not the only* [,] *proof of the fact to be ascertained.* A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." (emphasis added).

It is clear to this Court, as the district judge found, that the italicized portions of this charge shifted the burden of proof as to the intent issue to the appellee.[5] In *Sandstrom*

5. Appellee's trial counsel did not object to the trial court's charge on the issue of intent. Nevertheless, the Appellate Division did reach the merits of appellee's claim. Since the Appellate Division thus chose to ignore the New York State contemporaneous objection rule, "we see no warrant . . . for guarding state procedural rules more vigilantly than the State itself does." *Washington v. Harris*, 650 F.2d 447, 452 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1455, 71 L.Ed.2d 666 (1982). *See also Engle v. Isaac*, —— U.S. ——, 102 S.Ct. 1558, 1575 n.44, 71 L.Ed.2d 783 (1982); *Castaneda v. Partida*, 430 U.S. 485 n.4, 97 S.Ct. 1272, 1275 n.4, 51 L.Ed.2d 498 (1977)

v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court held that such a shifting of the burden as to an essential element of the crime charged was unconstitutional in light of its earlier holding in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that a defendant may not be convicted of a crime unless the prosecution meets the burden of proving beyond a reasonable doubt every element of the crime charged.

On appeal the State argues that the challenged portions of the charge given by the state court judge herein must be reviewed in the context of the entire charge, and that when viewed in that light any error was harmless. While the State's premise is correct, *see Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Nelson v. Scully*, 672 F.2d 266 (2d Cir. 1982); *Mancuso v. Harris*, 677 F.2d 206 (2d Cir. 1982), we do not agree with its conclusion.

As stated in *Cupp, supra*, "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* 414 U.S. at 147, 94 S.Ct. at 400. In *Nelson, supra*, this Court took heed of this warning and carefully analyzed the *Sandstrom*-type language in the context of the entire charge given. After making this examination, we concluded that "taking the entire charge into consideration, there was [no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272.

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In *Mancuso, supra,* at 210, this Court undertook a similar analysis of the language said to be violative of *Sandstrom,* and, after reviewing it in the context of the entire charge given by the state trial judge, rejected the contention that the inclusion of that language had violated the petitioner's constitutional rights. In addition, the Court found it significant that, in that case, the defendant had not specifically placed the question of his intent in issue, but had attempted instead to disassociate himself entirely from any involvement in the crime charged. *Id.,* at 211. *See also United States v. Reeves,* 594 F.2d 536, 541 (6th Cir.), *cert. denied,* 442 U.S. 946, 99 S.Ct. 2893, 61 L.Ed.2d 317 (1979).

In this case, however, appellee admitted that he stabbed Casilla. Thus the essential issue to be decided by the jury was whether appellee possessed the intent necessary to support a conviction for either murder in the second degree or manslaughter in the first degree.[6]

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6. New York Penal Law § 125.25 defines murder in the second degree, in pertinent part, as follows:

> "A person is guilty of murder in the second degree when:
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> 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

New York Penal Law § 125.20 defines manslaughter in the first degree, in pertinent part, as follows:

> "A person is guilty of manslaughter in the first degree when:
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> 1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
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> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . ."

In this regard we do not agree with the argument that by asserting the defense of self-defense the appellee conceded his intent kill Casilla. At trial appellee stated that he had acted in self-defense, that he was afraid for his life, and that he had no intent to kill. In this context, appellee's intent to defend himself is consistent with either (a) an intent to kill, (b) an intent to injure seriously, or (c) an intent to injure slightly. *See Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982). Thus, it cannot be said that the theory of defense in this case contributes to a finding that the offending portions of the charge to the jury created "[no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272, *Mancuso, supra*, at 211.

An analysis of the charge given in the state court leads us to the same conclusion. The trial judge twice charged the mandatory presumption that "a person is presumed to intend the natural and probable consequences of his acts," which was found to be constitutionally defective on the facts in *Sandstrom, supra*. In addition, toward the end of the charge as to intent, the judge greatly exacerbated its problematic character by stating that "the acts and physical manifestations of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained." Although the charge did also contain some instructive language which may have tended to be curative, we cannot say that, reading the charge as a whole, "there was [no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272. The fact that the court gave instructions as to the requirement that the prosecution must carry the burden of proof and as to the

reasonable doubt standard of proof does not cure the *Sandstrom* error present here since a reasonable juror could well have concluded that the presumption as to intent constituted a method of satisfying the prosecutor's burden. *Sandstrom, supra,* 442 U.S. at 519 n.7, 99 S.Ct. at 2456 n.7.

To refuse to grant the petition for a writ of habeas corpus in this case, where the violation was significant, and where intent was *the* crucial issue to be decided by the jury, would be wholly unwarranted in light of the holding of *Sandstrom.*

Retroactivity

Appellee was convicted in the state court on May 4, 1978. The Supreme Court rendered its decision in *Sandstrom, supra,* on June 18, 1979. On this appeal the State argues that *Sandstrom* should not be "retroactively" applied to invalidate convictions entered before the Supreme Court announced its decision in that case. However, even prior to the Supreme Court's decision in *Sandstrom, supra,* use of the language proscribed therein by a New York court was unwarranted in light of the law of both the State of New York and of this Circuit. In *People v. Thomas,* 50 N.Y.2d 467, 429 N.Y.S.2d 584, 407 N.E.2d 430 (1980), the New York Court of Appeals stated that "*Sandstrom* did not alter the law of this State. For more than a century, the charge condemned in *Sandstrom* has been held by this court, to be erroneous as a matter of State law (*Stokes v. People,* 53 N.Y. 164, 179 [(1873)]; *People v. Baker,* 96 N.Y. 340, 350 [(1884)]; *People v. Downs,* 123 N.Y. 558, 564-568, 25 N.E. 988 [(1890)]; *People v. Flack,* 125 N.Y.

324, 335, 26 N.E. 267 [(1891)]; *People v. Weiss*, 290 N.Y. 160, 171, 48 N.E.2d 306 [(1943)].)" 50 N.Y.2d at 472-73, 429 N.Y.S.2d at 587, 407 N.E.2d at 433. *See also United States v. Robinson*, 545 F.2d 301, 305-06 (2d Cir. 1976) ("the 'natural and probable consequences' charge . . . is a burden-shifting charge which has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt." 545 F.2d at 306); *United States v. Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975); *People v. Getch*, 50 N.Y.2d 456, 464 n.2, 429 N.Y.S.2d 579, 583 n.2, 407 N.E.2d 425, 429 n.2 (1980).[7]

We find, therefore, given the full context of this case, that the state judge's charge to the jury violated the constitutional rights of the appellee. Consequently, the decision of the court below granting the writ is affirmed. The mandate shall issue forthwith, and appellee must be released by the State unless he is retried within ninety days from the date the mandate issues herein.

LEVAL, District Judge, Sitting by Designation, concurring:

I concur, but add a few words on the significance of petitioner's failure to object at trial. As Judge Pierce notes, *see supra* note 5, the failure to object at trial should not be

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7. In *People v. Getch*, *supra*, 50 N.Y.2d at 464, 429 N.Y.2d at 583, 407 N.E.2d at 429, the New York Court of Appeals held, on federal constitutional grounds, that the Supreme Court's holding in *Sandstrom* was applicable to all cases still in the New York appellate process as of the date of that decision (June 5, 1980). As noted previously, appellee Ramirez's conviction was not affirmed by the Appellate Division until July 17, 1980. In reaching its decision the Appellate Division addressed appellee's *Sandstrom* claim, and rejected it, on the merits. 76 A.D.2d 115, 430 N.Y.S.2d 83 (1st Dep't 1980).

treated as a procedural bar to our consideration of the merits if it was not so treated by State appellate court. We should indeed not guard a state procedural rule more vigilantly than the state does. *See Washington v. Harris,* 650 F.2d 447, 452 (2d Cir. 1981).

This proposition means only that the door to the federal court will not be closed. It does not mean that the failure to object disappears from consideration. Upon the federal court's examination of the question whether the state conviction violated petitioner's constitutional rights, the failure to object remains a factor to be accorded whatever significance and weight it deserves.

A failure to object contemporaneously can be significant in a number of ways, apart from triggering a state law procedural bar. It is a part of the context of the alleged error. It can serve as a practical indication of the small importance of the incident, as appraised by trial counsel. It may result from a conscious choice by counsel to preserve the benefit of the error for appeal or collateral attack, rather than have it cured by bringing it to the trial judge's attention. It can raise questions of fairness to the People. In the practical context of a trial, furthermore, it can even occur through a prior understanding between counsel and the trial judge that is not reflected on the record. (For example, counsel for defendants who do not testify often ask the trial judge to omit the standard draw-no-inference charge.)

A state appellate court's consideration of the merits does not necessarily imply a finding that the failure to object should carry no adverse consequence for the defend-

ant. By hypothesis, the cases we consider on *habeas* are those in which the state appellate court has ruled against the defendant. In this case, it can be confidently inferred from the opinion of the Appellate Division that its reason for reaching the merits was the importance of giving guidance to the lower courts on a question rendered controversial by the Supreme Court's recent decision in *Sandstrom*. There was no appraisal nor even mention in the majority opinion of the failure to object. Since the court ruled against petitioner on the merits, reference to his failure to object was unnecessary. The fact that the ruling was made on the merits carries no logical inference that the court rejected procedural considerations or found them to be without significance.

When the federal court considers the issue on *habeas* and rejects the state court's analysis of the constitutional issue, it must then give whatever consideration is appropriate to the procedural context in determining whether the error committed calls for granting the writ and vacating the conviction. It would be anomalous if a federal appeals court considering functionally identical trial records, one on appeal from the district court and one on *habeas* from the state court, would affirm the federal conviction on a harmless finding, but vacate the state conviction over which federal review power is far more limited.

Because the charge in this case contained errors far more potent than the erroneous, but relatively bland, *Sandstrom* transgression, and because the faulty language bore directly on petitioner's intent—the central issue in the case, petitioner's failure to object does not alter the conclusion that he is entitled to a new trial.

APPENDIX B

Decision of the United States District Court for the Southern District of New York

Felix Ramirez,

Petitioner,

v.

E. W. Jones, Superintendent, Great Meadow Correctional Facility, Comstock, New York,

Respondent.

No. 80 CIV. 0797 (CBM).

United States District Court,
S. D. New York.

Nov. 16, 1981.

OPINION

Motley, District Judge.

Petitioner, Felix Ramirez, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated at the Great Meadow Correctional Facility at Comstock, New York. He was convicted upon

a jury verdict of manslaughter in the first degree in the New York Supreme Court, Bronx County on May 4, 1978. Judge Warner sentenced him to an indeterminate 5-15 year period of imprisonment.

Petitioner appealed his conviction to the Appellate Division arguing, *inter alia*, that the court's charge to the jury on intent eliminated the People's duty to prove intent, or shifted the burden of proof on that element, thereby denying him due process of law and a fair trial. On July 17, 1980, the New York Appellate Division, First Department, affirmed petitioner's conviction in a 3-2 decision, with majority and dissenting opinions that reached the issue on its merits. *People v. Ramirez*, 76 App.Div.2d 115, 430 N.Y.S.2d 83 (1st Dept. 1980). On August 21, 1980, petitioner's application for leave to appeal to the New York State Court of Appeals was denied.

The State Courts have thus had a "fair opportunity" to consider the alleged constitutional defect and petitioner, consequently, has satisfied the procedural prerequisite for all habeas corpus proceedings. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *United States ex rel. Nelson v. Zelker*, 465 F.2d 1121 (2d Cir.), *cert. denied*, 409 U.S. 1045, 93 S.Ct. 544, 34 L.Ed. 497 (1972). This court will therefore reach the merits of his claim.

Facts

Only a brief recitation of the facts is necessary to highlight the legal question at issue in this case. On November 11, 1976, petitioner and Estaban Casilla ("Smokey") had

an argument over a woman at a social club in the Bronx. The argument became heated and, apparently in preparation for a fight, Smokey removed his jacket and handed it to his friend, Del Valle. When Smokey's back was turned, petitioner pulled out a knife and stabbed Smokey in the chest, mortally wounding him. Del Valle, having turned to put down Smokey's jacket, did not actually see the stabbing, but did see the knife in petitioner's hand upon turning back. (Tr. 128-30).

Petitioner took the stand and testified at trial that at the time of the incident, he had been approached by five youths, including Smokey, who was carrying a police lock bar.[1] Petitioner testified that Smokey swung at him with the police lock bar, petitioner ducked to avoid the blow and, intending only to defend himself, stabbed Smokey. (Tr. 300-08).

The crucial issue before the jury was thus not whether petitioner had stabbed Smokey, which was admitted, but rather what his *intent* was, i.e. to cause death (second degree murder),[2] to cause serious physical injury (first de-

1. A police lock bar is part of a special apartment door lock. It is a cylindrical metal rod, about four feet long, which slips through a hinge on the inside of the door, its other end secured in a hole in the floor. (Tr. p. 171).

2. "A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person . . ."

New York Penal Law § 125.25(1).

gree manslaughter),[3] or to defend himself from attack from Smokey (justification).[4]

The trial court's entire charge on the definition of intent was as follows:[5]

"Let me now define this word intent for you.

A person is presumed to intend the natural and probable consequences of his acts. Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof to constitute

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3. "A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person . . ."

New York Penal Law § 125.20(1).

4. Under New York Penal Law § 35.05, conduct which would otherwise constitute an offense is justifiable and not criminal when:

"2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."

New York Penal Law §§ 35.10(6) and 35.15(2) further provide that a person may be justified in using physical force, even deadly force, under certain circumstances in order to defend himself. Thus, in New York, justification is a complete defense.

5. This definition of intent occurred during the portion of the charge dealing with murder in the second degree, an offense of which petitioner was acquitted. In the charge on manslaughter in the first degree, the offense of which petitioner was convicted, the court did not, however, give any definition of intent, an essential element of that crime. Thus, it can be assumed that the charge on intent was meant to apply to the manslaughter charge as well, and that the jury so understood it.

the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed rests upon the Prosecution to establish by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof of an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, you then are to determine the intention of the perpetrator at the time.

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts.

> The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind and its physical manifestation. *The accomplishment of the thing determined upon one's mind is compelled from necessity to refer to the acts and physical manifestation of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained.* A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

(Tr. 520-523) (emphasis added)

Petitioner now claims, as he did before the State Appellate courts,[6] that this charge to the jury deprived him of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Discussion

Petitioner argues that the trial court's instructions to the jury on the issue of intent violated his right to a fair trial by shifting the burden of proof on this issue to him, or by eliminating the People's duty to prove intent.

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6. Although trial counsel did not except to this instruction at trial, the Appellate Division did not reject the issue because of a failure to meet New York's contemporaneous objection requirement. Instead, the Appellate Division addressed the merits of Petitioner's constitutional claim. It is well established in this Circuit that where the Appellate Division has determined to consider the merits of an issue notwithstanding a defendant's failure to lodge a contemporaneous objection at trial, habeas corpus review is not precluded. *See, e.g., Washington v. Harris*, 650 F.2d 447, 451 (2d Cir. 1981) (there is "no warrant . . . for guarding state procedural rules more vigilantly than the state itself does").

Appendix B

There is no question that the due process clause protects the criminal defendant against conviction except upon proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecution must prove each and every element of a crime beyond a reasonable doubt and may not shift this burden to the defendant. *Id.* at 364, 90 S.Ct. at 1072. Indeed, in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (*Sandstrom*), the Supreme Court held that instructing the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," where the intent of the accused is an ingredient of the crime charged, is violative of the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, as it has the effect of relieving the People from proving the critical element of a defendant's state of mind.

Here, in the charge of the jury on the issue of intent, the trial court began the charge by stating that "[a] person is presumed to intend the natural and probable consequences of his acts" and concluded the charge with the admonition that "[u]nder our law, every person is presumed to intend the natural and inevitable consequences of his own acts." (Tr. 521-22). The state concedes that these two sentences bear a similarity to the language condemned as burden-shifting in *Sandstrom, supra,* but argues that these errors were more than ". . . offset and cured by the court's repeated emphasis on the fact-finding function of the jury and the burden of proof to be borne throughout by the prosecution." (Respondent's Brief, p. 8). The state

additionally relies on the fact that the trial court ". . . alluded to and explained the nature and importance of the reasonable doubt standard—and the role and responsibility of the jury in assessing such doubt—no less than 40 times." *Id.*

It is true that a jury instruction must be viewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *Callahan v. LeFevre*, 605 F.2d 70 (2d Cir. 1979). This does not mean, however, that an instruction by itself may never rise to the level of constitutional error. *Cupp v. Naughten, supra*, 414 U.S. at 147, 94 S.Ct. at 400. Instead, what it indicates is that the proper inquiry is whether the remainder of the charge ameliorated or aggravated the impact of the challenged instruction, *Callahan, supra*, 605 F.2d at 74-75, and whether the constitutionally infirm instruction "infected the entire trial." *Cupp v. Naughten, supra*, 414 U.S. at 147, 94 S.Ct. at 400.

The state's argument appears to be that this issue can be resolved by lining up the number of times the jury is instructed correctly against the number of times it is instructed erroneously. There is no support for this argument. It is patently clear that in *Sandstrom* the Court was concerned with the *impact* of the erroneous instruction upon the jury, and whether a reasonable juror could have interpreted the instruction as shifting or eliminating the People's burden of proof. *Id.* 442 U.S. at 514, 99 S.Ct. at 2454. Here, while the unconstitutional portions of the charge were qualified during the charge by reference to the fact-finding function of the jury, the trial court also told the

jury that "the intent exhibited by the results produced is the safest, *if not the only* proof of the fact to be ascertained." (emphasis added). This sentence, together with those identical to the instructions condemned in *Sandstrom*, overbears the qualifying portions and makes it extremely likely that a reasonable juror could have interpreted the instruction on intent, taken as a whole, as a conclusive presumption.

A conclusive (or mandatory) presumption is one where the jury is required to find an ultimate fact to be true upon proof of another fact unless they are persuaded by a preponderance of evidence offered in rebuttal. The conclusive presumption "may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).

A permissive inference allows, but does not require, the jury to infer the ultimate fact from proof of the basic one. The permissive inference

> leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof; it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could have made the connection permitted by the inference.

Id.

The ultimate test of the constitutional validity of both of these devices remains constant: the device must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the State, to find the facts beyond a reasonable doubt. *Id.* at 156, 99 S.Ct. at 2224.

Here, the jury received both a permissive instruction and conclusive presumptions. This court is not persuaded, however, that the additional permissive instruction was sufficient to dissipate the unconstitutional effect of the conclusive presumptions. As stated in *Sandstrom*:

> [E]ven if a jury could have ignored the [conclusive] presumption . . . we cannot be certain this is what they *did* do. As the jury's verdict was a general one . . . we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction. And "it has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." [citations omitted]

Id. 442 U.S. at 526, 99 S.Ct. at 2460. (emphasis in the original).

The *Sandstrom* Court also considered and rejected the argument, raised by the state here, that a proper instruction on the burden of proof and the presumption of innocence could offset the effect of the erroneous burden-shifting presumption.

> It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must

> be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

442 U.S. at 518 n.7, 99 S.Ct. at 2456 n.7.

Both the New York Court of Appeals and The Second Circuit have had occasion to consider the question at issue here. In *People v. Getch*, 50 N.Y.2d 456, 429 N.Y.S.2d 579, 407 N.E.2d 425 (1980), the Court of Appeals upheld the trial court's instruction that "*you may infer* that a person intends that which is the natural and necessary and probable consequences of the act done by him . . . [*Y*]*ou have a right to find* from the results produced an intention to effect it," 429 N.Y.S.2d at 582, 407 N.E.2d at 428, (emphasis added), because the specific burden-shifting instruction condemned in *Sandstrom* was not in the trial court's charge. In *People v. Marr*, a companion case decided on the same day, the challenged instruction, like the one here and in *Sandstrom*, was "*The law says* that a person is presumed to intend that which he actually does" and, later, "A person intends [the] natural and reasonable and probable consequences of his acts." *Id.* at 581, 407 N.E.2d at 427.* Unlike in *Getch*, the Court of Appeals concluded that there should be a reversal because "the court's instructions on intent followed, almost verbatim, the terms of the *Sandstrom* charge." *Id.* at 583, 407 N.E.2d at 429. This result was reached notwithstanding the fact that the trial court had informed the jury that the State had the burden of proving every element, including intent, beyond a reasonable doubt. *Id.*

In *United States v. Robinson*, 545 F.2d 301 (2d Cir. 1976), the district court, after charging the jury that the

* (emphasis added)

government had the burden of proving "intent to defraud," charged:

> In determining the issue of intent in this case a jury may reasonably infer, as I said before, that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

Id. at 305.

The Second Circuit reversed, in spite of the fact that the jury had been correctly instructed on the government's burden of proving intent and guilt beyond a reasonable doubt. "We cannot conclude that the jury ignored the specific, erroneous instruction. On the contrary, the jury probably applied the erroneous instruction and believed the government had satisfied its burden by proving mere negotiation of the checks." *Id.* at 306. *See also Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981) (finding "natural and probable consequences" charge at issue here impermissible, and remanding on other grounds).

What thus becomes clear is that by twice instructing the jurors that a person is presumed to intend the natural and probable consequences of his act, supplemented by directions that "the result[] produced is the safest, if not the only proof" of intent, the trial court ran afoul of the constitutional guarantees specifically enunciated in *Sandstrom*

and later affirmed by the New York Court of Appeals and Second Circuit. The court's charge here precluded the jury's proper consideration of the major trial issue—what petitioner intended—and concomitantly relieved the State from the burden of proving intent beyond a reasonable doubt. Reasonable jurors could have concluded that petitioner was either required to persuade them that he lacked intent, or that they were compelled to find intent because petitioner admitted, in the context of his claim of self-defense, that he stabbed Smokey. Consequently, petitioner was deprived of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Accordingly, the instant petition for writ of habeas corpus is granted and it is ordered that petitioner be released unless retried within sixty (60) days of the date of this court's order.